Office-Supreme Court, U.S.
FILED
NOV 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964
No. 144

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Request for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ROBERT A. NEEB, JR.,
9460 Wilshire Boulevard,
Beverly Hills, Calif. 90212.
Attorney for Appellant Woxberg.

GRANT B. COOPER,
3910 Oakwood Avenue,
Los Angeles, Calif. 90004.
Attorney for Appellant Dykes.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases	Page
United States v. Carter, 353 U. S. 210, 77 S. Ct. 893, 1 L. Ed. 2d 776	2, 3, 4, 5
United States v. Penn Foundry & Mfg. Co., 337 U. S. 198, 69 S. Ct. 1009, 93 L. Ed. 1308	5

Statute

United States Code, Title 29, Sec. 501(c)	1

IN THE

Supreme Court of the United States

October Term, 1964
No. 144

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Request for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Defendants pray that the Court grant a rehearing of its Order of October 12, 1964, denying Petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Ninth Circuit in the above-entitled case as prayed for in the Petition filed on the First day of June, 1964.

The decision affirms a judgment of the United States District Court for the Southern District of California, convicting petitioners of violating Title 29, United States Code, Section 501(c), which is the Labor-Management Reporting and Disclosure Act of 1959, more commonly referred to as the Landrum-Griffin Act.

The defendants, along with two other defendants not before this Court, were tried in the District Court of the Southern District of California on an indictment of twenty counts. Conviction was had on Counts I and II and IX and X. There was acquittal on all other counts. The Ninth Circuit reversed Counts I, IX and X, and confirmed conviction under Count II, to which this Petition for Rehearing for Certiorari is directed. The United States Supreme Court gave notice on October 12, 1964, that the Petition for a Writ of Certiorari was denied.

The point now urged for the rehearing is a new point which was not argued in the briefs by either side before the Supreme Court.

The point, briefly stated, is as follows:

Count II was a charge that appellants paid $220.00 by check to an auditor to transfer the funds in the "Severance Fund" out to the beneficiaries of that fund. It was the position of the appellants at all times that this was a legitimate and proper and legal expenditure, because the beneficiaries of the trust were entitled to receive their money without having to pay for the costs of distribution. This was the holding in the decision of the *United States v. Carter*, 353 U. S. 210, 77 S. Ct. 893, 1 L. Ed. 2d 776 (1957). This case is authority for the rule that beneficiaries in a trust are entitled to have the moneys due them distributed to them without a deduction therefrom for the expenses of distribution. This is provided, of course, that the trust is a valid one. The payment to the beneficiaries is, in the *Carter* case, held to be the gross amount, and that it would not be proper to deduct expenses and costs for the administration and distribution from

the fund itself. As a result, if the trust itself was a valid existing entity, the charge of $220.00 was properly paid by the Union rather than paid by and out of the corpus of the trust. The Ninth Circuit in its decision says the argument concerning the *Carter* case is a valid one if made to a jury, but then seeks to make a distinction by saying "to make that case applicable would require us to find that the original creation of the severance fund was lawful . . .".

It appears from its finding that the Ninth Circuit clearly had in mind that if the original creation of the fund was lawful, then the *Carter* case would apply, and there was no crime as alleged in Count II.

What the Ninth Circuit did was to state as follows:

> "To make that case applicable would require us to find that the original creation of the severance fund was lawful, *a question which we do not reach . . .*". (Italics ours.)

It was the position in the arguments of the briefs that the Court was required to make a determination and finding in this issue and not to pass by it.

However, a careful rereading of the decision of the Ninth Circuit shows that the Court, in the original appeal, had ruled on page 11 of the original decision, that the trust was a valid one, and the Court there stated "*This was a valid trust.*" (Italics ours.)

In the printing of the Petition in the Supreme Court, while these words appear, nevertheless it is easy to see how this point was missed because when they reprinted the decision of the Ninth Circuit, this statement begins on page 13 at the bottom thereof, and is concluded on page 14, and it would be very easy to read this without

noting this finding of the Ninth Circuit (Appendix "A", Opinion of the United States Court of Appeals for the Ninth Circuit).

Neither the appellants, nor the government, in the briefs pick up this point.

It is now apparent from a study of the decision of the Ninth Circuit that they made *two different findings on the same subject matter.*

This puts the appellants in the incredible position of having had the Ninth Circuit make one statement showing that they had determined that the trust was valid, and then later in the same case make another statement that they were not going to reach a decision as to the validity of the trust, and then continue on to say that since they were not going to reach such a decision, the *Carter* case would therefore not apply. There can be only one conclusion from their reference to the *Carter* case at this point, and that is that by refusing to reach a decision as to the validity of the trust, the Court was able to say that the *Carter* case would not apply. The reverse, therefore would be true and that if they held that the trust was valid, it is obvious that the *Carter* case would apply and since the *Carter* case has decided the point to the effect that distribution of funds in a valid trust are not to be charged against the funds in the trust, but are to be paid by the employer (in this case the Union), therefore it follows that the appellants could not have been guilty of any crime in paying out the $220.00 from the employer's funds.

because to do so would have been to comply strictly with the law as set out under similar circumstances in the *Carter* case.

That the Supreme Court of the United States has recognized the problems that arise when a Circuit Court renders an opinion which has within it conflicts, or is unclear, is recognized in a recent decision of the Supreme Court, being *John Wiley and Son, Petitioner, v. Livingston, etc.* This was Case No. 91, October Term, 1963, decided March 30, 1964, from the Second Circuit Court of Appeals.

In this case the Court granted a Writ of Certiorari and among other things went into the question of the Circuit Court of Appeal decision being, as the Court called it "unclear".

This was a case involving a Labor Law under the Labor-Management Relations Act, 29 U. S. C.

It has been held in a case from the Court of Claims that failure to make a necessary finding presents an issue of law to be determined by the Supreme Court.

> *United States v. Penn Foundry & Mfg. Co.*, 337 U. S. 198, 69 S. Ct. 1009, 93 L. Ed. 1308.

In that case, the Circuit Court gave different conclusions about the same point in different portions of their decision, and although the Court, after taking over on Certiorari did not reverse the case, it nonetheless made careful note of these discrepancies and differences in the Circuit Court's opinion.

In the case now before this Court for rehearing, these differences are of such an important nature that it is the position of appellants that the one count still remaining should be reversed, or that the whole matter should be remanded to the Ninth Circuit for the purpose of clearing up, if possible, what the Court meant by these divergent statements, and the rights of the defendants may be properly adjudicated.

Conclusion.

For the reasons set forth above, and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing the Writ of Certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

ROBERT A. NEEB, JR.,
Attorney for Appellant Woxberg.

GRANT B. COOPER,
Attorney for Appellant Dykes.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ROBERT A. NEEB, JR.,
Counsel for Petitioner
Woxberg.